

# The Position of Living Law in Society as a Source of Criminal Law According to Law Number 1 of 2023

<sup>1\*</sup>Yosep Copertino Apaut

Sekolah Tinggi Ilmu Hukum Cendana Wangi

Email: [yosepcopertinoapaut@gmail.com](mailto:yosepcopertinoapaut@gmail.com)

The enactment of Law Number 1 of 2023 concerning the Criminal Code marks a fundamental transformation of Indonesia's criminal law system through explicit recognition of living law as a source of criminal law. This normative juridical research analyzes the position of living law in the national legal hierarchy, its mechanism of application as a basis for punishment, and its implications for human rights protection and the principle of equality before the law. The research findings indicate that living law obtains normative legitimacy through Article 2 of the National Criminal Code with formalization mechanism through Regional Regulations requiring conformity with Pancasila values, human rights, and empirical validation. The transformation of the legality principle from formal to material reflects efforts to balance legal certainty with substantive justice in the context of Indonesian legal pluralism. Recognition of living law brings juridical implications including expansion of criminal law sources, changes in the role of judges in interpreting law, and potential differences in legal treatment across regions that must be safeguarded against discrimination. Implementation problems include tension between the dynamic characteristics of customary law and the static nature of regulations, complexity in determining territorial boundaries of application, and risks of bureaucratization that can eliminate the philosophical values of customary law. Improvements in implementing regulations, establishment of special supervisory bodies, and capacity building for law enforcement officers are needed to ensure proportional, just application of living law that respects citizens' constitutional rights.

**Keywords:** Living Law, Criminal Law, Legal Pluralism, Legality Principle, Human Rights

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**Corresponding Author:**

Yosep Copertino Apaut

Sekolah Tinggi Ilmu Hukum Cendana Wangi

[yosepcopertinoapaut@gmail.com](mailto:yosepcopertinoapaut@gmail.com)

## 1. Introduction

The ratification of Law Number 1 Year 2023 on the Criminal Code on January 2, 2023 marked a new chapter in the transformation of the Indonesian criminal law system that is more responsive to the social reality of society. One of the paradigmatic breakthroughs in this codification is the explicit recognition of the existence of living law as a source of criminal law, as stated in Article 2 paragraphs (1) and (2). This provision represents a fundamental shift from the rigidity of the conventional formal legality principle towards a balance between legal certainty and substantive justice that accommodates legal pluralism in Indonesia. The recognition of customary law and social norms that have long been rooted in the life of Indonesian society is not merely an effort to decolonialize the legacy of the Dutch *Wetboek van Strafrecht*, but also an answer to the limitations of written law in capturing the dynamics of local justice values that develop in the midst of Indonesia's multicultural society.

The concept of living law introduced by Eugen Ehrlich in the early 20th century received concrete

implementation space in the Indonesian criminal law system through the provisions of Article 2 of the Criminal Code which emphasizes that the applicability of written law does not reduce the existence of living law in society to determine whether a person should be punished, even though the act is not explicitly regulated in law. This arrangement presents a complex dialectic between the principle of legality that guarantees legal certainty and the principle of material justice that requires the law to be able to respond to the real needs of society. In the context of Indonesia's legal pluralism, where various legal systems coexist such as customary law, Islamic law, and state law, recognition of living law is a necessity to realize a criminal justice system that is not only legal-formal but also socio-cultural. However, the implementation of this provision presents a number of legal problems that require in-depth study, especially with regard to normative boundaries, formalization mechanisms through Regional Regulations, and potential inconsistencies with the principle of legality guaranteed by the constitution.

The position of living law in society as a source of criminal law raises crucial questions regarding the hierarchy and legitimacy of legal norms in the national legal system. Article 2 paragraph (2) of Law No. 1 of 2023 requires that living law only applies as long as it is in accordance with the values of Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by the community of nations. This limitation clause indicates an effort to create a safety mechanism so that the customary law applied does not conflict with the fundamental principles of the state and does not violate the constitutional rights of citizens. Furthermore, the explanation of Article 2 paragraph (2) asserts that the living law in the community in question must first be stipulated in a Regional Regulation based on the results of empirical research, which then raises an academic debate on whether this formalization requirement contradicts the essence of living law which is dynamic, organic, and unwritten. Formalization through Regional Regulations has the potential to change the characteristics of customary law from flexible and adaptive to rigid and bureaucratic-procedural, thus losing its substantial spirit as a law that truly lives in the collective consciousness of the community .

In the perspective of legal sociology, the recognition of living law is a manifestation of the theory of legal pluralism that recognizes the coexistence of various legal systems in one jurisdiction. Indonesia as an archipelago with ethnic, cultural and belief system diversity has its own complexities in integrating customary law into the national criminal law system . Various regions in Indonesia have diverse customary institutions and sanctions, ranging from the sangkil system in Bali, pepadon in Lampung, to fences in the Batak community, all of which have social legitimacy and effectiveness in resolving conflicts and maintaining local community order. The challenge, however, is how to ensure that these recognized customary laws are not discriminatory, do not violate human rights, and remain in line with modern rule of law principles. There are concerns that without adequate oversight, the application of living law could be misused to legitimize practices that contradict universal values such as gender equality, protection of minority groups, and respect for human dignity. Therefore, a comprehensive study is needed on the position, function and limitations of living law as a source of criminal law within the framework of a just and humane Indonesian criminal justice system.

Based on the background that has been described, this research formulates several main problems that become the focus of study: First, what is the position of the law that lives in the community as a source of criminal law in the hierarchy of the national legal system according to Law Number 1 Year 2023? Second, what are the mechanisms and conditions for the enactment of laws that live in the community as a basis for punishment associated with the principle of legality and the principle of legal certainty? Third, what are

the juridical implications of the recognition of living law towards the protection of human rights and the principle of equality before the law in the Indonesian criminal justice system?.

This research aims to comprehensively analyze the position of the law that lives in society as a source of criminal law based on Law Number 1 Year 2023, examine the mechanisms and normative limitations of its applicability in law enforcement practices, and evaluate its juridical implications for the guarantee of human rights and the principle of justice in the criminal justice system. Theoretically, this research is expected to contribute to the development of criminal law science, especially related to legal pluralism and the transformation of the principle of legality in the context of national criminal law reform. Practically, the results of this research are expected to be a reference for law enforcement officials, policy makers, and indigenous peoples in understanding and implementing living law provisions proportionally, so as to create a balance between respect for local wisdom and protection of legal certainty and fundamental rights of citizens.

## 2. Research Methods

This research uses a normative juridical method which is a scientific research procedure to find the truth based on the logic of legal science from the normative side. The normative juridical method was chosen because the focus of this research is on the assessment of positive legal provisions that regulate the position of living law as a source of criminal law, especially in the context of the implementation of Law Number 1 of 2023 concerning the Criminal Code. Normative legal research or what is often referred to as doctrinal legal research is research that examines the law as a written system of norms, where analysis is carried out on the internal aspects of laws and regulations without paying attention to community behavior in their implementation. The characteristics of this research are prescriptive which is oriented towards finding the truth of coherence between the legal norms studied with higher legal norms or with the underlying legal concepts.

The approaches used in this research are statute approach and conceptual approach. The statutory approach is carried out by examining all regulations and laws relating to the legal issues studied, especially those governing living law in the national criminal law system. Through this approach, researchers analyze the consistency and coherence between various laws and regulations, starting from the 1945 Constitution, Law Number 1 of 2023, to implementing regulations at the relevant regional level. The conceptual approach is used to analyze the views and doctrines developed in law, particularly related to the concept of living law, legal pluralism, and the transformation of the principle of legality in contemporary criminal law. This conceptual approach provides a theoretical framework that assists researchers in building legal arguments and understanding the philosophical meaning of the legal provisions studied.

The type of data used in this research is secondary data sourced from legal materials, consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law No. 1 of 2023 on the Criminal Code and its explanation, Law No. 12 of 2011 on the Formation of Legislation as amended by Law No. 13 of 2022, Regional Regulations governing customary law and living law, and court decisions relevant to the application of living law in the context of punishment. Secondary legal materials consist of legal textbooks written by experts in criminal law and customary law, articles in national and international legal scientific journals, legal research results, seminar papers, and opinions of scholars discussing criminal law reform and legal pluralism in Indonesia. Meanwhile, tertiary legal materials used include legal dictionaries,

language dictionaries, legal encyclopedias, cumulative indexes, and other materials that provide guidance or explanation of primary and secondary legal materials.

The technique of collecting legal materials in this research was carried out through library research by inventorizing, identifying, and classifying legal materials relevant to the research problem. The collection of legal materials was carried out systematically through searches of various sources, both physical and digital, including university libraries, legal documentation center libraries, and credible online legal databases. The process of collecting legal materials was carried out using documentation techniques, namely by recording and quoting the substance of various sources of legal materials which were then organized according to the research discussion framework. All legal materials collected were then verified for validity through an examination of the authenticity of the source, relevance of the substance, and relevance to the object of research to ensure the credibility of the data used in the analysis.

The analysis of legal materials in this research uses a descriptive-analytical method with a qualitative approach. The descriptive method is used to describe systematically and comprehensively the position of living law in the national criminal law system based on the provisions of the applicable laws and regulations, while analytical is used to describe and analyze in depth the various normative aspects of the living law arrangement. The analysis technique used is normative-qualitative analysis, in which the legal materials that have been collected are processed through the stages of selection, classification, and systematization to then be analyzed logically-juridically using the logic of deduction and legal interpretation. The interpretation applied includes grammatical interpretation to understand the textual meaning of legal provisions, systematic interpretation to understand the relationship between various legal norms, and teleological interpretation to understand the purpose and intent of the legislators in formulating provisions regarding living law. The whole process of analysis is carried out based on legal principles, legal theories, and relevant legal doctrines to produce prescriptive conclusions regarding how the position of living law in the Indonesian criminal law system should be applied appropriately and fairly, as well as to provide juridical recommendations for improving the regulation and implementation of related provisions in the future.

### **3. Discussion**

#### **A. The Position of Laws Living in Society as a Source of Criminal Law in the Hierarchy of the National Legal System**

##### **1. Living Law Regulation in Article 2 of Law No. 1 Year 2023**

The transformation of Indonesia's criminal law system reached its historical momentum through the explicit recognition of living law in Article 2 of Law Number 1 Year 2023. This provision is a fundamental breakthrough that changes the orientation of criminal law from a purely positivistic paradigm to a more sociological and contextual approach. Article 2 paragraph (1) expressly states that the provisions of the principle of legality do not reduce the validity of the laws that live in society that determine that a person should be punished, even though his actions are not regulated in law. The formulation of this norm marks a significant paradigmatic shift, where the state no longer positions written law as the only source of legitimacy for punishment, but rather opens space for socio-customary norms that are truly alive and obeyed in certain communities.

Restrictions on the applicability of living law are strictly stipulated in Article 2 paragraph (2) which requires conformity with the values of Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by the community of nations. This restriction is crucial to prevent discriminatory or repressive

application of customary law. The elucidation of this article makes it clear that what is meant is customary norms that are actually obeyed, have effective social sanctions, and are accepted as substantive justice by the local community, not merely romanticized or fabricated by local elites. The reform of criminal law through the 2023 Criminal Code has focused on three main issues in criminal law, namely criminal offense, criminal responsibility, and punishment, each of which is a sub-system as well as pillars of the overall building of the criminal system.

A comparison with the old Criminal Code (*Wetboek van Strafrecht*) shows fundamental differences. The colonial KUHP adhered to a very strict principle of formal legality (*nullum crimen, nulla poena sine lege scripta*), which completely closed the possibility of punishment based on unwritten norms. Customary law in the old system was only considered as a sociological factor in sentencing, not as a source of criminal law itself. In contrast, the National Criminal Code adopts a material legality approach that recognizes that unlawfulness does not only stem from the law, but also from social norms that live and are recognized by the community. Law Number 1 Year 2023 is the embodiment of national criminal law based on Pancasila and the 1945 Constitution as a replacement for the legacy of the Dutch East Indies colonial government, where the material criminal law reform no longer distinguishes between crimes and offenses.

## **2. Position of Living Law in the Hierarchy of Legislation**

In the perspective of the hierarchy of laws and regulations, living law is not explicitly included in the formal structure as stipulated in Article 7 paragraph (1) of Law Number 12/2011 on the Formation of Laws and Regulations starting from the 1945 Constitution to Regency / City Regional Regulations. However, its recognition in the National Criminal Code provides indirect normative legitimacy to customary law as a source of criminal law. The position of living law is outside the formal structure of the hierarchy, but obtains binding force through the formalization mechanism determined by law, especially through Regional Regulations.

Article 14 of Law No. 12/2011 opens space for Regional Regulations to accommodate the special conditions of the region, which becomes a juridical bridge between customary law and the state legal system. This provision is very important because Article 2 paragraph (3) of Law Number 1 Year 2023 mandates that the procedures and criteria for determining laws that live in the community are further regulated by Government Regulation. In practice, customary law that will be used as the basis for punishment must first be identified, researched, and then formalized through regional regulations. Thus, local regulations function as legalization instruments that bridge social norms with the state legal system.

Furthermore, Article 15 paragraph (1) of Law Number 12/2011 emphasizes that criminal provisions can only be contained in Laws and Regional Regulations. This means that systematically, living law cannot stand alone as a basis for punishment without going through a formalization mechanism in the Regional Regulation. The binding force of living law in the criminal justice system depends on this formal recognition, as judges cannot simply apply customary law without a clear normative basis. Law No. 13 of 2022 as an amendment to Law No. 12 of 2011 strengthens the role of regions in the formation of legal norms through strengthening the principle of community participation in Article 96, which is very relevant because living law can only be formalized if there is involvement of indigenous peoples as legal subjects.

## **3. Living Law as a Form of Legal Pluralism in Indonesia**

The recognition of living law reflects the state's acceptance of legal pluralism in the national legal system. Legal pluralism recognizes the coexistence of various legal systems, namely state law, customary law, and religious law. In the context of a multicultural Indonesia with ethnic, cultural and belief system diversity, legal pluralism is a social reality that cannot be ignored. The implementation of the Restorative Justice

Village program as a pioneer in resolving crimes in a family manner shows that the concept of living law can be integrated in the modern criminal justice system, especially for minor crimes that can be resolved safely, peacefully and peacefully.

The coexistence of these legal systems is reflected in the recognition of customary law as a living law, without negating the supremacy of state law. Living law gains double legitimacy: social legitimacy derived from community acceptance and compliance, and juridical legitimacy obtained through recognition in legislation. Without juridical legitimacy, living law only functions as a social norm, not a legal norm that can be enforced through state criminal sanctions. Various regions in Indonesia have diverse customary institutions and sanctions, all of which have social legitimacy and effectiveness in resolving conflicts and maintaining local community order. Research in Bengkulu City shows that the application of Lembak adat, Malay adat, Serawai adat, and Rejang adat has been gazetted through Regional Regulation No. 29/2003 on the Gazettement of Adat of Bengkulu City, although there is no uniformity in the process of resolving adat offenses that occur.

## **B. Mechanisms and Conditions for the Applicability of Living Law as a Basis for Criminalization in Relation to the Principle of Legality**

### **1. Requirements for the Applicability of Living Law According to Law No. 1 Year 2023**

The applicability of living law as a basis for punishment requires the fulfillment of three main aspects which are cumulative. First, material requirements that demand conformity with the values of Pancasila, the 1945 Constitution, and human rights as affirmed in Article 2 paragraph (2). This provision serves as a normative filter to prevent the application of customary law that is discriminatory, repressive, or contrary to human dignity. Customary norms that contain violence, discrimination, or degrade human dignity cannot be used as a basis for punishment, so that the minimum standards of human rights are non-derogable and cannot be overridden by any customary law.

Secondly, the formal requirements that require stipulation through Regional Regulations. This formalization is necessary to ensure legal certainty and accountability for the application of customary law in the criminal justice system. Without a formal basis, the application of living law has the potential to violate the principle of legality and open space for arbitrariness. Third, empirical requirements that require valid research on the existence, applicability, and social acceptance of the customary law. This research must be conducted in a scientific, participatory, and accountable manner, so that the recognized living law truly reflects living norms, not the fabrication of local elites. To enforce living law, law enforcers will face difficulties related to the four indicators contained in Article 2 paragraph (2) of the Criminal Code which are cumulative.

### **2. Transformation of the Principle of Legality in the Context of Living Law**

The recognition of living law marks the transformation of the principle of legality from formal legality to material legality. The principle of legality is no longer narrowly understood as a requirement for the existence of written laws, but also includes the values of substantive justice that live in society. Nevertheless, Article 1 paragraph (1) of the Criminal Code still emphasizes the prohibition of punishment without legal basis, so that the recognition of living law must be interpreted restrictively and carefully. The balance between legal certainty and substantive justice is key in the application of living law, where judges are required to interpret the principle of legality contextually by considering the value of social justice without compromising the principle of protecting human rights.

This transformation reflects an effort to balance legal certainty with substantive justice. Legal certainty is maintained through the mechanism of the Perda, while substantive justice is realized by respecting local values that live in the community. In every Article of Criminal Offense, there are one or more bestanddelen (elements of offense), where in general not all elements of the Article of Criminal Offense are the core part of the offense that is against the law (*wederrechtelijk*) as a determinant of guilt that leads to criminal liability. The formulation of living law in the Criminal Code must be reinterpreted by involving experts in customary law, legal anthropology, legal sociology, and interdisciplinary legal researchers to achieve justice based on Pancasila.

### **3. Mechanism of Formalization of Living Law**

Formalization of living law is carried out through a process of inventory and codification of customary law by the Regional Government. This process must be based on empirical research that is objective, participatory, and involves customary law experts, traditional leaders, and civil society to ensure objectivity and legitimacy. The results of the research are then set out in an Academic Paper as required by Article 56 and Article 57 of Law No. 12/2011, which requires that every local regulation formation must be preceded by the preparation of a comprehensive research-based academic paper.

Furthermore, testing the suitability of living law with constitutional values is carried out through a judicial review mechanism. Regional Regulations that contain living law-based criminal provisions can be tested by the Supreme Court based on Article 9 paragraph (2) of Law Number 12/2011 jo. Law Number 13 Year 2022, if it is considered contrary to higher regulations. This mechanism is very important to ensure that formalized customary law does not conflict with the 1945 Constitution and human rights, and remains in line with the principles of a modern legal state.

### **4. Problems of Living Law Formalization**

The formalization of living law faces various fundamental problems. First, there is a tension between the dynamic characteristics of customary law, which develops flexibly following social change, and the static nature of written regulations, which tend to be rigid and bureaucratic. The bureaucratization process has the potential to eliminate the philosophical values of customary law and reduce it to an administrative norm that loses its substantial spirit as a law that truly lives in the collective consciousness of the community. Second, the determination of the boundaries of the area where living law applies often leads to conflicts of authority between regions, especially in areas with high cultural heterogeneity and complex population mobility. The existence of Article 2 paragraph (1) of the RKUHP, which makes the law that lives in the community as the basis for determining that a person can be convicted even though the law does not regulate it, can conflict with the principle of legality and protection of human rights, and has the potential to cause legal uncertainty for citizens.

## **C. Juridical Implications of the Recognition of Living Law on the Protection of Human Rights and the Principle of Equality before the Law**

### **1. Guarantee of Human Rights Protection**

Recognition of living law is not absolute because it is limited by constitutional human rights standards. Customary norms that have been formalized can be tested through constitutional review if they conflict with the 1945 Constitution, especially Article 28A to Article 28J which regulates human rights. The state must ensure that no living law violates non-derogable rights, such as the right to life, freedom from torture, and the principle of non-discrimination. Supervisory mechanisms to prevent human rights violations must

be carried out strictly, because without adequate supervision, the application of living law can be misused to legitimize practices that are contrary to universal values.

## **2. Principle of Equality Before the Law**

The application of the living law has the potential to lead to different legal treatment between regions and between citizens. This difference can be justified as long as it is not discriminatory and still ensures the protection of vulnerable groups such as women, children and minorities. Harmonization between local specificity and human rights universality is an absolute requirement so that the principle of equality before the law is maintained. This principle is very important in the context of a democratic state of law, where every citizen is entitled to equal treatment before the law without discrimination based on cultural background or region of residence.

## **3. Implications for the Criminal Justice System**

Judges have important authority in applying the living law, especially in assessing its applicability and compatibility with national legal principles. Judges have a crucial role in interpreting the purpose of punishment to balance justice and the rights of the convicted. The relationship between state and customary courts should be complementary, not competitive or subordinate. Court decisions that apply living law can be an important precedent in the development of national criminal law with Indonesian characteristics, as well as providing legal certainty for the application of customary norms in the future.

## **4. Recommendations for Regulatory Improvement**

A comprehensive implementing regulation is needed to regulate the procedures for inventory, validation and supervision of living law. The establishment of a special supervisory body can be considered to ensure the harmonization of living law with the national legal system and the protection of human rights. The harmonization strategy between living law and the national legal system must continue to be developed so that legal pluralism runs in balance with legal certainty and justice. Public participation in the process of discussion and formation of regulations must be increased, because research shows that there has been a neglect of public participation in the process of forming the RKUHP which has led to criticism and rejection. With proper regulatory improvements, recognition of living law can be an effective instrument to realize substantive justice without sacrificing legal certainty and protection of human rights.

## **4. Conclusion**

The regulation of living law in society as a source of criminal law through Law Number 1 Year 2023 marks a paradigmatic transformation of the Indonesian criminal law system from a purely positivistic orientation towards a more contextual and sociological approach. The position of living law in the hierarchy of the national legal system gains normative legitimacy through explicit recognition in Article 2 of the National Criminal Code, although it is not included in the formal structure of the hierarchy of laws and regulations. Its binding force is obtained through the formalization mechanism in Regional Regulations that function as a juridical bridge between customary norms and the state legal system. The validity of living law as a basis for punishment requires the fulfillment of three cumulative aspects, namely material requirements in the form of conformity with the values of Pancasila and human rights, formal requirements through stipulation in Regional Regulations, and empirical requirements that require validation through scientific research. The transformation of the principle of legality from formal to material reflects an effort to balance legal certainty with substantive justice, where the law is no longer narrowly understood as written law alone but also includes the value of justice that lives in society. The juridical implications of the recognition of living law for the protection of human rights are guaranteed through strict restrictions that customary

norms must not conflict with non-derogable constitutional rights, while the principle of equality before the law is maintained as long as differences in legal treatment between regions are not discriminatory and still protect vulnerable groups. Problems that arise are mainly related to the tension between the dynamic characteristics of customary law and the static nature of written regulations, the potential for bureaucratization that can eliminate the philosophical value of customary law, as well as the complexity of determining the boundaries of the area of applicability in the midst of cultural heterogeneity and high population mobility.

### Advice

The implementation of living law provisions in the criminal justice system requires regulatory improvements through the establishment of comprehensive implementing regulations to systematically regulate procedures for inventorying, validating and monitoring living law in society. The government needs to establish a special supervisory body involving experts in customary law, legal anthropology, legal sociology, and judicial practitioners to ensure the harmonization of living law with the national legal system and the protection of human rights. The process of formalizing customary law through regional regulations must be preceded by empirical research that is objective, participatory, and involves indigenous peoples as legal subjects to ensure social and juridical legitimacy. Capacity building of judges and law enforcement officials is needed to understand the characteristics of customary law and apply it proportionally without ignoring the principles of legal certainty and protection of constitutional rights. The harmonization strategy between living law and the national legal system must continue to be developed through constructive dialogue between the central government, local governments and indigenous peoples to create a balance between respect for local wisdom and the guarantee of legal certainty. Periodic monitoring and evaluation mechanisms for Regional Regulations that contain living law-based criminal provisions need to be carried out to ensure that there is no abuse or application of customary norms that are contrary to universal values. Public participation in every stage of regulation formation must be increased to ensure that the resulting law truly reflects the aspirations and needs of the community. Further research on the effectiveness of living law application in criminal justice practice is needed to provide empirical evaluation for the improvement of national criminal law policy in the future.

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